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No. 467

In the

Supreme Court of the United States

OCTOBER TERM, 1958

On Petition for Writ of Certiorari to the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas

DAVID LEE FLOWERS,
Petitioner,

v.

NANCE EXPLORATION COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

Petitioner's Petition for Writ of Certiorari was not filed within ninety days after the entry of the state court judgment

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OPINION BELOW

The opinion of the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas is reported in 305 S. W. 2d commencing at page 621.

JURISDICTION

This Court does not have or should not exercise jurisdiction hereof for the reasons:

1. The Petition for Writ of Certiorari was not filed in this Court within ninety days after the entry of the state court judgment which is being attacked.

2. The decision of the state court rests on non-federal grounds.

QUESTIONS PRESENTED

1. Has this Court jurisdiction?

2. Assuming timely filings, the existence of a federal question, and that this court will determine local law, did the Texas court properly determine and then aptly apply the Texas law?

STATEMENT

This is a common law negligence case involving a Texas accident which was litigated between Texas people in a Texas court.

The Texas Court of Civil Appeals decided duty questions and concluded that since Respondent was no more than an invitee to the place of accident and was not in possession and control thereof or of the work being done, Respondent did not owe duties to Petitioner alike those which are due and owing to a sub-contractors' workmen by a general contractor in possession and control of premises where

work is being done. Accordingly the state court decided against the claims which Petitioner asserts holding, among other things:

> "Under the undisputed evidence in this case, including appellee's testimony, we conclude, as a matter of law: (1) that the danger in the high power electric line was open and obvious; (2) that appellee knew of and realized the danger; (3) that as a matter of law he was charged with the danger, whether he realized it or not." (P. 624.)

Applying Texas rules, the Court of Civil Appeals rendered judgment in favor of Respondent and against Petitioner, and the Supreme Court of Texas found no reversible error in the decision in Respondent's favor.

The judgment of the Texas Court became final on July 23rd, 1958, the day when the Supreme Court of Texas overruled Petitioner's Motion for Rehearing of Application for Writ of Error. (Petition, pp. 2, 23.) Petition for Writ of Certiorari was filed in the Court on October 22nd, 1958, *ninety-one* days after the entry of the judgment below.

ARGUMENTS

Jurisdiction.

The statute[1] and Rule 22 of this Court fix the time for making application to the Supreme Court for a writ of certiorari. The application here was not made within the 90 days so prescribed. The expiration of this stated period extinguished any right which Petitioner had to ask review of the state court judgment.

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[1] 28 U. S. C. 2101(c).

Additionally, this suit did not draw in question the validity of either a Federal or state stautute. The claims of error which Petitioner asserts are as to errors of local law. No question of a federal nature was before the courts below in the decision which was reached that Respondent is not liable for Petitioner's damages.

The Texas law was properly determined and then aptly applied:

Many are the Texas cases which are cited in Judge Holvey Williams' opinion which is under attack. A reading of the cases cited in the Court of Civil Appeals opinion will demonstrate that the applicable decisions of Texas courts have been exactly followed.

In Texas, the law as declared by the Supreme Court of the State is: "* * * one cannot recover for injuries sustained while voluntarily exposing himself to a danger which he either does or should fully realize and appreciate." *McKee v. Patterson (Tex. Sup. Ct. 1954), 271 S. W. 2d 391, numbered paragraph 3, page 394.* Under the decision of that case no duty is imposed upon the employer of an independent contractor to give warning to that contractor's employees of a danger of which such employee knows. According to *Texas Electric Service Co. v. Holt (Tex. Civ. App. 1952, er. ref., n. r. e.), 249 S. W. 2d 662* even if Petitioner had not known of the danger, and even if it were not an open and obvious danger, the knowledge of danger which Petitioner's superintendent Bailey admittedly had fully relieved Respondent of duty to give further warning of

danger. The duty to warn in such an instance would be the duty of the employee's employer and not the employer of that employer.

These and the other Texas cases cited in the state court opinion prompted the decision which was handed down. Since, in Texas, "Negligence is a failure to observe a legal duty" and "* * * to constitute negligence at all, there must be a violation of a duty owned to the very person claiming on the ground of negligence.", *30-b Texas Jurisprudence 175-177* and "The question as to whether or not a legal duty exists under a given state of facts and circumstances, as well as the nature and extent of such duty, if any, is essentially a question of law for the decisions of the courts." *City of Bryan v. Jenkins (Tex. Civ. App. 1952, er. ref., n. r. e.), 247 S. W. 2d 925; McKee v. Patterson (Tex. Sup. Ct. 1954), 271 S. W. 2d 391*, the Court of Civil Appeals in deciding duty questions were deciding questions of law determinable by Texas Courts, and the decision here as to such law was right.

The state court also found that Respondent was not the owner or occupier of the premises where accident happened. The University of Texas owned the land. Gulf Oil Corporation owned an oil and gas lease and a seismograph permit thereon. West Texas Utilities Company owned and operated the power line. D. A. Peachee Drilling Company, Petitioner's employer, owned the drilling rig and other of the physical equipment of accident. It was that company, not Respondent, who had employed Petitioner to do his work. For these reasons, the Court of Civil Appeals was

correct in holding that Respondent owed no duty to Petitioner to warn or otherwise protect him. As stated in *65 C. J. S. 609,* "Ordinarily, a person who is not the owner and is not in control of certain property is not liable for negligence in respect of such property." Citing *Rinker v. Galveston-Houston Electric Ry. Co. (Tex. Civ. App. 1915), 176 S. W. 737.*

Petitioner, as is recited in the court's opinion, knew the location of the overhead wires. The law charged him with knowledge that the overhead electric wires of which he knew were dangerous and that it would be dangerous for him to come in close proximity to them. *Cloud v. Houston Lighting & Power Co. (Tex. Civ. App. 1947), 199 S. W. 2d 260, err. ref., n. r. e.; West Texas Utilities Co. v. Dunlap (Tex. Civ. App. 1943), 175 S. W. 2d 749, no writ noted; McGinty v. Texas Power & Light Co. (Tex. Civ. App. 1934), 71 S. W. 2d 354, er. ref.* With this knowledge of dangers, duty did not exist to warn Petitioner thereof. *McKee v. Patterson (Tex. Sup. Ct. 1954), 271 S. W. 2d 391 at page 393; McElhenny v. Thielpape (Tex. Sup. Ct. 1956), 285 S. W. 2d 940; Sears Roebuck & Co. v. Robinson (Tex. Sup. Ct. 1955), 280 S. W. 2d 236.*

The state court concluded its opinion with the holding that the acts of the driller under whom Petitioner worked and over whom Respondent had no control, were the sole proximate causes of the accident. *West Texas Utilities Co. v. Harris (Tex. Civ. App. 1950), 231 S. W. 2d 558, er. ref., n. r. e.*

The state court was in its proper field in determining, as the court did, that Respondent had violated no duty owing to Petitioner and that Respondent was not legally liable for the injuries which Petitioner received. No constitutional or other right of Petitioner became violated by the Court's proper application of Texas law to the facts of the Texas accident.

Petitioner's Cases:

In *Galveston-Houston Electric Railway Co. v. Reinle (Tex. Sup. Ct. 1924), 258 S. W. 803*, the defendant's duties were based not only upon its *possession and control* of the premises, but also upon the fact that the defendant was continuing to operate its electric railway while the work was being done and was "knowingly keeping in operation a force" that was dangerous to the workmen. The duty arose out of the defendant's control of the electric line and its affirmative act in continuing to operate the electric line while the work was being done. The court made it clear that the duty which was there imposed was a duty resting upon "the owner or occupant of real estate," "a company controlling premises," "the user of wires charged with electricity," "electric companies" and the person having "premises in his possession and under his control." Possession of premises, the ownership of properties thereon and control of the work of accident was not in Respondent. These facts distinguish the *Reinle* case from the case here.

In *Smith v. Henger (Tex. Sup. Ct. 1950), 226 S. W. 2d 425,* Henger's agreement expressly provided that he should have "exclusive control of the supervision and co-ordination of the construction of said building" (p. 430) and the court emphasized that Henger "took over the control" of the entire construction site. The duty which was there found to exist was the duty of "the owner or occupant of land," "the person in control of the premises" (p. 431). The duties of that case are not to be imposed upon a non-occupier of the premises as was Respondent in this case. There, too, the danger was a concealed danger of which Smith did not know. Here, the danger was an open and obvious danger of which Petitioner knew, of which he had warning, and with which he was charged with knowledge.

Triangle Motors of Dallas v. Richmond (Tex. Sup. Ct. 1953), 258 S. W. 2d 60, involved a danger of which Richmond did not know. But there it was held that the *owner* and *occupier* of premises was under duty to warn of *hidden* dangers. Here, Petitioner knew of the overhead wires, was charged with knowledge of their danger, and Respondent was not the owner in possession, or an occupier in control of the wires and place of accident.

Walgreen Texas Co. v. Shivers (Tex. Sup. Ct. 1941), 154 S. W. 2d 625, and *McAfee v. Travis Gas Corp. (Tex. Sup. Ct. 1941), 153 S. W. 2d 442,* involved questions about contributory negligence as a matter of law. Duty questions such as those involved in this case were not before the courts in those cases. In the *McAfee* case the injury was

from an explosion of gas. The pipe line from which the gas came was owned, maintained and controlled by the defendant. The explosion was caused by an affirmative act of the defendant's employee in striking a match at the place where gas was leaking. In the *Shivers* case the defendant had made and was in possession and control of the properties of accident. In the present case Respondent did not own, maintain or control the electric power line or the land where accident occurred. Besides, it was not Respondent's employee, but was Petitioner's fellow employee who caused the accident by lowering the mast into the West Texas Utilities Company electric line.

Revels v. Southern California Edison Company, 248 P. 2d 987, the 1952 opinion of a California Court of Appeals, is like some of the Texas cases just above mentioned and that case involved questions as to the duty owing to employees of sub-contractors by "a general contractor on a construction job who is in control of the premises". (p. 989). In the state court judgment under attack the holding was:

(305 S.W. 2d ex. pp. 626-627):

> **"* * * However, we hold in this case that there was no duty on the part of the appellant to warn the appellee, because the appellant was not the owner nor occupier of the pre... **. He was an independent contractor under Gul... Peachee Drilling Company was an independent contractor under appellant. Therefore, each was an invitee on the premises, but appellant had no more control over the premises than did Peachee Drilling Company. It was not the owner or occupier in control of the premises, and had no possession of or control over the land. It was merely an invitee, as was the Peachee Drilling Company. All of the authorities we have found holding the general ... under such circumstances are those where the general contractor was in possession and control of the premises**

> and created the danger, or was in control of it: 65 C. J. S. Negligence, par. 94, p. 609."

and this decision is not in conflict with any of the cases cited in the petition for writ of certiorari.

The race discrimination cases which Petitioner cites in his Petition for Writ of Certiorari do not appear to us to have any application here. The parties to this cause are white litigants and race issues are not in this case.

We do not attempt to speculate as to the meaning of the per curiam opinion reinstating the trial court judgment in *Gibson v. Phillips Petroleum Company, 352 U. S. 874, 77 S. Ct. 16, 1 L. Ed. 2d 77*. We do know that before the Texas Court of Civil Appeals Petitioner claimed that the result in that case "thereby struck down the doctrine in the *McKee* case."[2] (p. 625). This contention required the Texas Court of Civil Appeals to declare as that court did that Texas local law is as that law is declared by Texas courts. If *Erie R. Company v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487* still stands, then the Texas court had the right to differ with the decision of this Court in the *Gibson* case if the results there were in any sense declarative against Texas local law. It was not improper for the Texas court to say that that court disagreed with Petitioner's contention that the *Gibson* case struck down the doctrine in the *McKee* case.[3]

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[2]271 S. W. 2d 391. This is the Texas Supreme Court decision to which reference has several times been made. It was in that case that it was clearly said that the *doctrine volenti non fit injuria* is a defense to all negligence actions in Texas.

[3]Please see 18 Louisiana Law Review 195 as to the meanings of Gibson v. Phillips Petroleum Company, 352 U. S. 874.

CONCLUSION

The Texas courts have properly handled and properly disposed of this case. A petition for Certiorari has not been timely filed against their decisions. Accordingly, it is respectfully submitted that the Petition for writ of Certiorari be dismissed or be denied.

Respectfully submitted,

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Midland, Texas,
Of Counsel.

CERTIFICATE OF SERVICE

Copy of the foregoing was deposited in the United States mail at Midland, Texas, in properly stamped envelope addressed to counsel for Petitioner, viz.: Huff & Splawn, at their post office address, P. O. Box 506, Lubbock, Texas (some 120 miles distant), this the 13 day of November, 1958. THIS I CERTIFY.

WILLIAM L. KERR,
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Midland, Texas,
Counsel for Respondent.